

November 23, 2011

VIA ELECTRONIC MAIL

Robert Perlis  
U.S. Environmental Protection Agency  
Office of General Counsel  
Ariel Rios Building  
1200 Pennsylvania Ave., NW  
Mail Code: 2333A  
Washington, DC 20460

Re: Draft NOIC - Existing Stocks Provision

Dear Mr. Perlis:

I am writing on behalf of Reckitt Benckiser LLC ("Reckitt Benckiser") to raise an objection regarding the Draft Notice of Intent to Cancel and Notice of Denial of Registrations for Certain Rodenticide Bait Products ("Draft NOIC") that recently was placed in the docket for the upcoming Scientific Advisory Panel Meeting. As you are aware, the Draft NOIC sets forth EPA's conclusion that the sale and distribution of existing stocks of any product subject to the Draft NOIC will be prohibited after any final cancellation order relating to those products has been issued, presumably following an administrative hearing and review of the decision by the Environmental Appeals Board ("EAB"). See Draft NOIC at § IX. Moreover, the Draft NOIC states that EPA's determination with respect to existing stocks is outside the scope of a Section 6(b) hearing, and thus cannot be challenged at the cancellation hearing by any party adversely affected by EPA's decision. *Id.*

EPA's determination that its decision cannot be challenged in a cancellation hearing is without statutory or regulatory support, and is contrary both to prior EPA actions and existing EPA practice. As a result, for the reasons set forth more fully below, Reckitt Benckiser requests that EPA remove its assertion relating to the scope of the cancellation hearing from its Draft NOIC, and that the Agency expressly recognize the authority of the Administrative Law Judge ("ALJ") to consider and resolve the issue of the appropriate distribution of existing stocks during a cancellation hearing.

EPA's assertion that existing stocks determinations cannot be challenged in a Section 6(b) hearing is based solely upon a superficial comparison of that provision and Sections 3(c)(2)(B) and 6(e); the Draft NOIC states that because those provisions contain explicit reference to existing stocks, and Section 6(b) does not, existing stocks cannot be addressed in a 6(b) cancellation hearing. EPA's analysis is devoid of any additional

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support, and in fact is contrary to the plain language of the statute. As set forth in Section 6(d), the scope of a Section 6(b) hearing includes any “issues raised by the objections filed by the applicant . . .”, or, if the hearing is called by EPA, those “issues stated by the Administrator.” Thus, contrary to EPA’s assertions otherwise, the scope of a 6(b) hearing is defined by the issues addressed by the Administrator in the Notice of Intent to Cancel, or any objections raised by the party requesting a hearing. Nothing in 6(b) or 6(d) contains any suggestion that existing stocks are not appropriately part of a 6(b) hearing. Here, because EPA has made a preliminary determination in its Draft NOIC with respect to existing stocks, the issue is properly within the scope of the Section 6(b) hearing and subject to objections that may be raised by interested parties.

This conclusion is supported by FIFRA’s legislative history, which makes clear that the sole reason that Section 6(e) makes specific mention of existing stocks is because hearings initiated under that provision are intended to be abbreviated versions of a Section 6(d) hearing. *See* Statement of Douglas M. Costle, EPA Administrator, H.R. Rep. 95-663 at 61 (April 27, 1977) (stating that a Section 6(e) hearing “should be confined to whether or not the conditions were met and how existing stocks should be handled[, because] Public resources should not be devoted to long, drawn-out cancellation procedures for these types of registrations.”). In contrast, hearings initiated under Section 6(b) are intended to address the full swathe of issues permitted in a Section 6(d) hearing, including review of EPA’s recommendations with respect to the disposition of existing stocks.

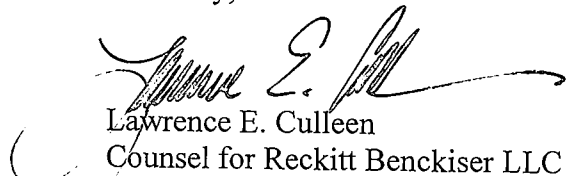
Furthermore, this interpretation is supported by decisions rendered by the EAB, which make clear that the scope of a 6(b) cancellation includes any regulatory decision addressed in the NOIC. “In procedural terms, the notice [of intent to cancel] serves much the function as a complaint in any other administrative proceeding, and as such, it sets a standard of relevance which shall govern the proceedings at the hearing.” *In re Shell Oil Co.*, 1 E.A.D. 517, 1979 WL 52074 at 5 (E.P.A. April 9, 1979) (internal quotation omitted). As a result, when the notice of cancellation includes a regulatory decision, whether it relates to cancellation of particular products or the disposition of any existing stocks of such products, that issue is appropriately within the scope of topics to be addressed in the cancellation hearing. The EAB — acting on behalf of the Administrator — squarely addressed this issue in *In re Cedar Chem Co.*, 2 E.A.D. 584, 1988 WL 525242 at 3 n. 9 (E.P.A. June 9, 1988). In that case, the Administrator stated: “[o]bviously, if an issue is identified in the cancellation notice, it fits within the framework of the proceeding and may be litigated in a hearing.” *Id.*

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We have not located any instance in which EPA has asserted preemptively in the context of a Notice of Intent to Cancel that the issue of disposition of existing stocks is outside the scope of topics to be addressed at a cancellation hearing, and in fact in the past EPA has expressly recognized that the issue of existing stocks *can* be addressed at a Section 6(b) cancellation hearing. *See, e.g.*, Notice of Intent to Cancel or Restrict Registrations of Pesticide Products Containing Toxaphene, 47 Fed. Reg. 53,784, 53,792-93, 1982 WL 153737 (Nov. 29, 1982) ("The 30-day time period in which to request a hearing is applicable to all the regulatory actions proposed in this Notice, including ... the existing stocks provisions . . . .") EPA's assertion that the issue of disposition of existing stocks is outside the scope of a cancellation hearing, and thus cannot be addressed by the Administrator, is contrary to prior EPA practice, and unsupported by FIFRA and its legislative history. As a result, Reckitt Benckiser insists that EPA remove the language at issue from its Draft NOIC, and expressly recognize in any final NOIC (if one is issued in this matter) that it is not only appropriate but necessary that the ALJ and EAB consider and address the issue of disposition of existing stocks during cancellation hearings.

Please feel free to contact me at 202/942-5477 if you wish to discuss the foregoing.

Sincerely,



Lawrence E. Culleen  
Counsel for Reckitt Benckiser LLC

cc: Steven Bradbury, OPP  
Richard Keigwin, PRD/OPP  
Leslye Fraser, OGC  
Scott Garrison, OGC